About the renegotiation of the solar power purchase contracts signed before 2011

Sébastien CANTON
Associé, Avocat au Barreau de Paris

Laurence DURIEZ
Avocat au Barreau de Paris

It would be an understatement to say that the news, revealed by the newspaper Les Echos on September 16, that the Ministry of Economy and Finance was, for budgetary reasons, reportedly considering "*renegotiating*" the solar power purchase contracts concluded by producers and EDF Obligation d'Achat (or other obligated buyers) before 2011, has had the effect of a "bomb" within the French solar industry.

Since this news came out, a common belief has been that only "*large solar power plants*", the scope of which is yet to be defined, will be affected, and that the planned modification will involve a reduction in the duration of the purchase contracts to 13 or 15 years (instead of 20), rather than in the feed-in tariff level.

This newsletter aims to offer some insight into one of the possible bases of this ministerial step: the "*right of the Administration to unilaterally modify administrative contracts*".

- **In general, is it possible for a solar power purchase contract to be unilaterally modified?**

  Since the enactment of Law No. 2010-788 of July 12, 2010 "*on national commitment to the environment*" (the "Grenelle 2" law, article 88 III 3°, currently article L. 314-7 of the Energy Code), contracts to obligatorily purchase power from renewable energy sources are considered to be "*administrative contracts*".

  With this provision, the legislator was able to *"kill two birds with one stone"*: the so-called "*mutability*" principle specific to administrative contracts was made applicable to solar power purchase contracts; according to this principle, the public entity may, at any time, unilaterally impose a modification or even the termination of the administrative contract.

AVOCATS RECHTSANWÄLTE LAWYERS
29, RUE DU FAUBOURG SAINT-HONORÉ,75008 PARIS
EMAIL bmh@bmhavocats.com TÉL (33)(0)1 42 66 63 19

- **Can the Ministry of Economy and Finance modify a purchase contract that it was not a party to?**

  Most purchase contracts bind a power producer to EDF Obligation d'Achat, which is a private company in which the French State holds a majority stake. Thus, no public entity is a party to the purchase contract.

  However, the *"Council of State"* (*"Conseil d'Etat"*, the French top jurisdiction for matters involving the Administration) highlighted the fact that the clauses of the solar power purchase contract mostly included regulatory provisions, which had the effect of fully suppressing contractual freedom (CE, January 22, 2020, no. 418737, "*Electricité de France (EDF) v. Corsica Sole*")

  On the basis of this case law, one can put forward the idea that the purchase contract is of a "*quasi-regulatory*" nature, and that only the Administration would be entitled to modify its terms.

- **Are the conditions for unilateral modification legally defined?**

  Several conditions must be met by the public entity.

  On the one hand, this modification must be justified by a *"public interest reason"* (Council of State (CE), May 2, 1958, N°. 32401, "*Distillerie de Magnac-Laval*").

  There has been a certain degree of tolerance in the case law for modifications to administrative contracts based on the need to control public expenditure (CE, May 23, 2011, No. 328525, *"Public establishment for the Development of the La Défense region"*).

  On the other hand, it is settled case law that a unilateral modification of an administrative contract cannot result in the financial clauses of that contract being called into question (CE, May 16, 1941, "*Vizille Commune*", Rec. CE 1941, p. 93: CE, January 16, 1946, "*City of Limoges*", Rec. CE 1946, p. 15).

  Lastly, the unilateral modification of an administrative contract by the public entity must be accompanied by compensation for the co-contractor in order to maintain the overall financial balance of the contract (CE, March 21, 2010, "*Cie générale française des tramways*", Rec. CE 1910, p. 216).

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EMAIL bmh@bmhavocats.com TÉL (33)(0)1 42 66 63 19

This compensation must cover both the losses incurred and the lost profits (CE, June 5, 1953, "*Département de l'Isère*", Rec. CE 1953, p. 270).

This condition seems to constitute a serious obstacle to the "unilateral modification" of solar power purchase contracts: the Economy and Finance Ministry would have to compensate the solar electricity producers for the losses caused by the tariff reduction, which would contradict with the aim to cut public spending.

This contradiction may have prompted the Ministry of Economy and Finance to consider reducing the duration of the contracts in question, and not the tariff stipulated therein.

Nevertheless, in our view, a reduction of the contracts' duration, instead of an overall decrease in the contract price, does not appear to provide a solution to the issue described above.

- **Can a unilateral modification to a purchase contract apply to contracts signed before 2011?**

The "Tribunal des Conflits" had ruled in its aforementioned decision of December 13, 2010 that "*the modification made by the second text to the first one (...) changes, retroactively, the nature of the contracts in question and, therefore, the court competent to hear them….*"

Once the characterisation of purchase contracts can be modified retroactively, it could be inferred that the Administration would be entitled to modify retroactively solar power purchase contracts.

However, this reasoning runs up against the fundamental principle of the "non-retroactivity" of the acts carried out by the Administration (CE, 25 June, 1948, "*Société du Journal l'Aurore*": Rec. CE 1948, p. 289).

However, the administrative judge reckons that this fundamental principle does not necessarily hinders the Administration from modifying an administrative contract.

In addition, in a decision dated March 24, 2006 (no. 288460, "KPMG"), the Council of State indicated that, firstly and "*subject to the general rules applicable to administrative contracts*", only a legislative provision may, for reasons of public interest, authorise the application of the new standard to current contracts and, secondly, that the Government should establish some transitional provisions if the new rules are likely to unduly impair existing contractual situations that have been legally established.

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29, RUE DU FAUBOURG SAINT-HONORÉ,75008 PARIS
EMAIL bmh@bmhavocats.com TÉL (33)(0)1 42 66 63 19

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Following this preliminary analysis, the "*unilateral modification of administrative contracts by the Administration*" applied to solar power purchase contracts seems to us to raise important legal questions.

An alternative for the Ministry of Economy and Finance might be to provide for the modification with retroactive effect in a law and to state reasons of public interest.

In the latter case, transitional arrangements should be made to avoid "undue impairment" on existing purchase contracts, a criterion that will surely be the subject of fierce discussion between the Ministry and producers.

Should the current negotiations prove unsuccessful, the producers should already consider the possibility of appealing against a decision likely to undermine the economic balance of their activity.

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EMAIL bmh@bmhavocats.com TÉL (33)(0)1 42 66 63 19